issue in all cases, unless expressly admitted". As was in effect pointed out in *Scott* v. *Sampson, supra,* both by Mathew J., and Cave J., the rules as they stood at that time (in 1882) could operate so as to cause injustice in cases of libel where it was thought necessary to call evidence which might operate to mitigate damages. Presumably, it was in consequence of that that Order 36 rule 37 was enacted. It reads:—

"In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the Judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

To my mind, considering the history of the matter, the rule can only operate to cut out evidence which it is sought to put in solely for the purpose of mitigating damages and cannot be read so as to keep out evidence which is otherwise relevant but which could incidentally have some effect on the quantum of damages. In the present case the defendant did not seek to justify. His main defence was a defence of privilege and the evidence in question was relevant to the question of privilege. He said in effect that it was his duty to tell the District Council what he did tell them. The judge held he was wrong in thinking that he was under any such duty but the evidence complained of was clearly relevant to that issue and admissible as such. It may have some effect on the judge's mind in assessing damages but as it was not directed exclusively to the issue of damages it was not struck at by Order 36 rule 37.

Ong J.: I agree with the judgments just delivered by my Lords and have nothing to add.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.; P. T. Wong & Co.*

KERPA SINGH v. BARIAM SINGH & ANOR.

[C.A. (Thomson C.J., Barakbah and Azmi JJ.) October 21, 1961]

[Kuala Trengganu — F.M. Civil Appeal No. 14 of 1961]

Tort — Trespass to the person — Incised wounds on head — Medical evidence as to wounds — Inference as to weapon used.

The plaintiff in an action for damages for assault alleged that the defendants waylaid and assaulted him. He also stated that just before he was attacked by the defendants two Malays came out of the jungle and attempted to attack him and that he drove them off with a stick. The medical evidence disclosed incised wounds on the left mastoid region and forehead; a broken shoulder blade and other injuries. The doctor who examined the plaintiff stated that the head injuries could have been inflicted with an axe. The learned trial judge held that the injuries were inflicted by the two anonymous Malays on the instigation of the defendants. On appeal, the defendants relied on a defence of alibi.

Held: (1) there was no evidence to support the finding of the learned trial judge that the two anonymous Malays had caused the injuries;

(2) it was not at all certain that the head injuries had been caused with an axe for the medical evidence was that they could have been caused with an axe not that they were caused by an axe.

COURT OF APPEAL.

H. L. Wrigglesworth for the appellant.

N. A. Marjoribanks for the respondents.

Cur. Adv. Vult.

Thomson C.J.: The plaintiff in this case is a milk vendor residing near Kota Bharu in Kelantan. On the night of 7th July, 1959, he was returning home after dark when he was attacked by some person or persons armed with weapons of some sort and sustained personal injuries which, though no doubt severe, did not at any time place his life in danger.

It was the plaintiff's case that the persons who attacked him and injured him were the defendants, both of whom like himself are Sikhs, and in due course after they had been prosecuted criminally he sued them for damages. The action, of course, was for trespass to the person.

In his statement of claim the plaintiff alleged that the defendants together assaulted and beat him, the first defendant struck him with an axe and the second defendant struck him with a stick. At the trial he followed but elaborated his pleading. He said that on the night in question he was returning home on his bicycle when two Malays came out of the jungle and made to attack him. He drove them off with a stick and as they fled the two defendants came out of the jungle. The first defendant struck him two blows with an axe behind the left ear and on the forehead and as he turned to run towards a neighbouring house the second defendant struck him several times on the back with a stick, one of the blows breaking the right shoulder blade.

There was medical evidence to the effect that the plaintiff was examined at the hospital shortly after the attack on him and was found to have an incised wound over the left mastoid region and an incised wound on the forehead, both of which could have been caused by the sharp cutting edge of an axe, and a number of other injuries including a broken shoulder blade which could have been caused either by a fall or by blows with a stick. There is also evidence that some time later at a meeting of the local Sikh community there was some sort of admission of liability by both the defendants.

The defences as pleaded were in the first place *non facit* and in the second place, and in the alternative, that at the meeting of the Sikh community the plaintiff's claim against the defendants had been "settled" by mutual agreement. At the trial the second and alternative defence was abandoned and both defendants relied on a defence of alibi, they were not there and they did not know anything about the affair and had nothing whatsoever to do with it. They did, however, admit there had been some sort of previous trouble between them and the plaintiff.

In the event the trial judge came to the conclusion that he could not accept the plaintiff's evidence that both the defendants were present when the plaintiff was attacked though he was apparently in some doubt in the case of the second defendant. He took the view that only the anonymous Malays were present and that it was they who inflicted the injuries upon the plaintiff but that they had been employed and instigated to do so by the defendants. On that he gave judgment for the defendants but deprived them of their costs on the ground that they "are not blameless in the matter".

Against that decision the plaintiff has now appealed.

With the greatest respect I am unable to follow the trial judge's course of reasoning.

In the first place I would observe there is not a scrap of evidence directly to support his conclusions. The plaintiff's story is that it was the defendants who inflicted the injuries upon him. The defendants' story is that they were not there. Nobody has said a word to the effect that it was the anonymous Malays who inflicted the injuries. Indeed it is not unfair to say that the judge based himself very much on the probabilities of the case. One of the arguments he relied on was that the head injuries on the plaintiff were inflicted by an axe, that it is a matter of common knowledge that in the State of Kelantan there is a small class of professional criminals who undertake for hire or reward to injure other people with axes, that these professional criminals are of the Malay race, and that therefore because these were axe injuries it was more probable that the injuries inflicted on the plaintiff were inflicted by Malays than that they were inflicted by Sikhs.

Now, it may be true that in the State of Kelantan there are Malay criminals of the sort described. After all even in Eden there was a serpent. And it may be, though this may be less certain, that the activities of these persons are such as to exclude any very strong possibility of axe injuries being inflicted by other types of persons. I do not profess to know and I express no opinion.

I would, however, observe that the whole structure of what would otherwise be an impeccable syllogism is based on what would seem to be a misunderstanding of the medical evidence.

The doctor who examined the plaintiff did not say that in her opinion the head injuries on the plaintiff were inflicted with an axe. What she said was they could have been inflicted by an axe. Now, it is clear from her evidence that in the case of neither of the injuries was there a corresponding fracture of the skull. As a matter of ordinary commonsense (I am not attempting to take judicial notice of anything beyond the most elementary facts of life) it is possible, though not perhaps very probable, that a man could be struck a violent blow on the head with the edge of an axe without a fracture of the skull resulting, but it would seem to me altogether beyond any reasonable bounds of probability that a man could suffer two such blows without at least one of them producing a fracture of the skull. The truth, of course, is that the doctor was not very closely examined on the point and in particular her attention was not invited to the passage in *Taylor's Medical Jurisprudence* (10th Edition: Volume I, p. 290) where it is said that in the case of a scalp wound it is difficult to differentiate between a wound caused by a blunt instrument and an incised wound. Had this point been put to the lady it is to my mind very likely that she would have said the scalp wounds although they could have been caused by an axe were not necessarily so caused and could have been caused by blows with a stick or other blunt instrument.

In all the circumstances of the case I think that the interests of justice demand that the case be retried and I would accordingly allow the appeal. The costs of the first trial and of the appeal should abide the result of the second trial.

Syed Sheh Barakbah J.: I have had the opportunity of reading the judgment written by the learned Chief Justice. I entirely concur with his judgment and the order proposed and have nothing to add.

Azmi J.: I have had the advantage of reading the judgment prepared by the President of the Court of Appeal. I agree with it and have nothing to add.

Appeal allowed. Retrial ordered.

Solicitors: *H. L. Wrigglesworth; Lovelace & Hastings.*

SIN GEE SENG v. WAI WAH TRADING CO.

[O.C.J. (Ambrose J.) November 25, 1961]

[Singapore — Suit No. 788 of 1959]

Possession of goods obtained by fraud — Factors Act, 1889, ss.9, 2(1) — Subsequent sale — Title of innocent purchasers — Retaking of goods by original sellers — Trespass — Conversion.

The sole proprietor of Seng Hong Trading Co. agreed to buy 200 cases of plate glass from the defendants and to pay cash on delivery. When the goods were delivered, Seng Hong Trading Co. tendered a cheque, which was accepted on the understanding that the property in the goods was not to pass until the cheque had been honoured. The plaintiffs bought the goods from Seng Hong Trading Co. in good faith and without notice of any right of the defendants in respect of the goods. The cheque was dishonoured and the property in the goods did not pass to Seng Hong Trading Co. The defendants, on discovering the whereabouts of the goods, entered into the plaintiffs' store without their permission and removed some of the goods, and later caused the police to remove the remaining goods. The plaintiffs brought this action to recover damages for (1) trespass to land, (2) trespass to goods, and (3) conversion.

Held: (1) although the defendants' consent to Seng Hong Trading Co. obtaining possession of the goods was induced by fraud, the fraud did not nullify the consent as no fundamental mistake was induced by the fraud, and Seng Hong Trading Co. obtained possession of the